

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GENE ALLEN,

Petitioner,

v.

STATE OF NEVADA, *et al.*,

Respondents.

Case No. 3:23-cv-00406-RCJ-CLB

ORDER

Petitioner Gene Allen, a *pro se* Nevada prisoner, has not properly commenced this habeas action by either paying the standard \$5.00 filing fee or filing a complete application for leave to proceed *in forma pauperis* (“IFP”). The Court has conducted a preliminary review of the petition, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The Court concludes that the petition in the instant action is subject to summary dismissal.

I. Failure to File a Complete IFP Application or Pay Filing Fee

Pursuant to 28 U.S.C. § 1914(a) and the Judicial Conference Schedule of Fees, a \$5.00 filing fee is required to initiate a habeas action in a federal district court. The Court may authorize an indigent prisoner to begin a habeas action without paying the \$5 fee if he or she submits an IFP application on the approved form and includes three specific documents: (a) the prisoner’s financial declaration and acknowledgement showing an inability to prepay fees and costs, (b) a financial certificate signed by the prisoner and an authorized prison official, and (c) a copy of the prisoner’s account statement for the six-month period prior to filing. 28 U.S.C. § 1915(a); LSR 1-1, LSR 1-2.

Petitioner has not filed a complete IFP application or paid the \$5 filing fee. Although Petitioner submitted an application (ECF No.6), he has not filed a complete IFP application on the Court’s required form as required.

II. Failure to Exhaust

This action appears to challenge Petitioner’s continued confinement and the denial of parole

1 by the Nevada Board of Parole Commissioners. Petitioner previously filed a habeas corpus petition
 2 in this Court challenging his continued confinement and denial of parole, filed under case number
 3 3:14-cv-00510-RCJ-VPC, case number 3:15-cv-00088-MMD-VPC,¹ and case number 3:23-cv-
 4 00076-MMD-CLB. In case number 3:14-cv-00510-RCJ-VPC, Petitioner was appointed counsel
 5 and the Court granted the respondents' motion to dismiss for failure to exhaust. The Court
 6 dismissed the action for failure to comply with the Court's order to choose to stay and abey or
 7 dismissal without prejudice.

8 Here, Petitioner has not alleged or demonstrated that he fully exhausted his state court
 9 remedies. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas
 10 petitioner first must exhaust state court remedies on a claim before presenting that claim to the
 11 federal courts. 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is meant to give state courts
 12 the first opportunity to review and correct alleged violations of federal constitutional guarantees as
 13 a matter of federal-state comity. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). "A petitioner
 14 has exhausted his federal claims when he has fully and fairly presented them to the state courts."
 15 *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O'Sullivan v. Boerckel*, 526 U.S.
 16 838, 844–45 (1999)). To satisfy the exhaustion requirement, a claim must have been raised through
 17 one complete round of either direct appeal or collateral proceedings to the highest state court level
 18 of review available. *O'Sullivan*, 526 U.S. at 844–45; *Peterson v. Lampert*, 319 F.3d 1153, 1156
 19 (9th Cir. 2003) (en banc).

20 It is clear that Petitioner has not exhausted his state court remedies. Petitioner has not
 21 alleged or demonstrated that: (1) each claim in his petition was presented to each level of Nevada
 22 courts through to the Supreme Court of Nevada; (2) any proceedings before the state appellate
 23 courts concluded with the issuance of a remittitur or notice in lieu of a remittitur; and (3) the state
 24 appellate courts addressed the merits of the claims. Dismissal is appropriate.

25 **III. Failure to State Ground for Federal Habeas Relief**

26 Moreover, an inmate does not have a federal constitutional right "to be conditionally

27
 28 ¹ In case number 3:15-cv-00088-MMD-VPC, the Court dismissed the action as duplicative
 as case number 3:14-cv-00510-RCJ-VPC was still pending.

1 released before the expiration of a valid sentence, and the States are under no duty to offer parole
2 to their prisoners.” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). Because habeas relief is not
3 available for errors of state law, federal courts may not intervene in parole decisions as long as
4 minimum procedural protections are provided. *Id.* Federal due process protection for a state-created
5 liberty interest is “minimal”; all that is required is that “the minimum procedures adequate for due
6 process protection of that interest” have been met.” *Id.* at 220-21. The allegations in the petition
7 fall short of establishing that the State failed to provide Petitioner with the required procedural
8 protections when it denied him parole.

9 The Court further declines to recharacterize the petition as a § 1983 complaint. When a
10 habeas petition is amenable to conversion on its fact, i.e., it names the correct defendants and seeks
11 the correct relief, a federal court may construe the petition to plead causes of action under § 1983.
12 *Nettles v. Grounds*, 830 F.3d 922, 935-36 (9th Cir. 2016). However, habeas action and § 1983
13 prisoner civil rights cases “differ in a variety of respects—such as the proper defendant, filing fees,
14 the means of collecting them, and restrictions on future filings—that may make recharacterization
15 impossible or, if possible, disadvantageous to the prisoner compared to a dismissal without
16 prejudice of his petition for habeas corpus.” *Id.* In this case, the petition is not amenable to
17 conversion on its fact because it is not clear that Petitioner has named the proper defendant or
18 whether recharacterization would disadvantage him. The Court will therefore dismiss the petition
19 without prejudice and instruct the Clerk of the Court to send Petitioner a form complaint for § 1983
20 civil rights actions, so that Petitioner may assert claims under 42 U.S.C. § 1983 in a new case if he
21 chooses to do so.

22 It is therefore ordered that Petitioner’s petition for writ of habeas corpus (ECF No. 1-1) is
23 dismissed without prejudice.

24 It is further ordered that a certificate of appealability is denied as jurists of reason would not
25 find the Court’s dismissal of the petition to be debatable or wrong.

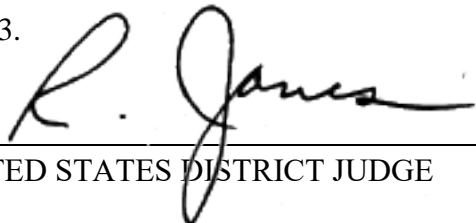
26 It is further ordered that the Clerk of the Court sent Petitioner one blank copy of the form
27 complaint for § 1983 civil rights actions.
28

1 It is further ordered that under to Rule 4 of the Rules Governing Section 2254 Cases, the
2 Clerk of Court is directed to add Nevada Attorney General Aaron D. Ford as counsel for
3 respondents and informally serve the Nevada Attorney General by directing a notice of electronic
4 filing of this order to his office. No response is required from respondents other than to respond to
5 any orders of a reviewing court.

6 It is further ordered that Petitioner's motion for appeal for reconsideration of denial of
7 parole (ECF No. 4), motion for order (ECF No. 5), application for leave to proceed *in forma*
8 *pauperis* (ECF No. 6), and motion for a designation of transcripts (ECF No. 7) are denied as moot.

9 It is further ordered that the Clerk of the Court is instructed to enter final judgment
10 accordingly and close this case.

11 DATED THIS 20th day of September 2023.

12 
13 _____
14 UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28